

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080267
	:	TRIAL NO. B-0705110-A
Plaintiff-Appellee,	:	
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
DAMIEN CHERRY,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Damien Cherry was found guilty following a bench trial of two counts of felonious assault, one in violation of R.C. 2903.11(A)(1) and one in violation of R.C. 2903.11(A)(2), one count of having weapons under a disability in violation of R.C. 2923.13(A)(3), and one count of receiving stolen property in violation of 2913.51(A). Each of the felonious-assault counts included both a one-year and a three-year gun specification. The trial court merged the felonious assaults and their accompanying gun specifications for purposes of sentencing. It sentenced Cherry to a total of 15 years in prison.

On appeal, Cherry raises a sole assignment of error in which he argues that his convictions were based upon insufficient evidence and were against the manifest weight of the evidence.

When a defendant claims that a conviction is supported by insufficient evidence, this court must review the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found all the elements of the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

crime proved beyond a reasonable doubt.² When reviewing a defendant's claim that a conviction is against the manifest weight of the evidence, this court must weigh the evidence and the credibility of the witnesses to determine if the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.³

At trial, the state presented evidence that sometime between midnight and 2:00 a.m. on June 11, 2007, 16-year-old Tyris Taylor was standing outside his apartment building, watching a fight, when Cherry walked up to him and pulled him by his shirt to the back of the building. Cherry then pulled out a gun, pushed Taylor up against the building, and demanded his money.

Taylor's 15-year-old brother, Darron Richards, was in his bedroom when he heard a commotion outside his window. When he looked out, he saw Cherry, with a gun to his brother's back, asking him "[W]here the money at?" Richards immediately ran outside and told their mother, Cassandra Terry. Richards, Terry, and the brothers' stepfather, Dell Robinson, then ran to the back of building. They saw Cherry with a gun to Taylor's back. Terry shoved Cherry away from Taylor. As Taylor turned to run away, Cherry shot him twice, once in the back of each leg. Cherry then ran into the woods behind the building.

Two days later, Taylor told police that Cherry had shot him. The following day, Taylor, Richards, and their mother were separately shown a photographic lineup of six individuals. All three identified Cherry as the assailant.

On June 16, 2007, Cincinnati police officer Doug Snider was on routine patrol with his partner in the Over-the-Rhine district when he saw a 1998 brown Chevrolet Tahoe that matched the description of a vehicle that had been reported stolen. They started following the vehicle, which was driven by Cherry and traveling at a high rate of

² *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

³ *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211.

speed. It made several sharp turns before finally stopping in a gravel parking lot. The officers pulled in behind the vehicle to initiate a traffic stop. Officer Snider checked the vehicle's license plate and learned that the vehicle had been stolen at knifepoint in an aggravated robbery. As a result, he took Cherry into custody. Cherry told Officer Snider that the vehicle was not his and that he did not know who owned it. Cherry was also unable to tell the officers where he had obtained the vehicle. He told them he was taking the vehicle to a friend in the Northside neighborhood.

Shortly thereafter, Officer John Dotson interviewed Cherry. Cherry denied assaulting Taylor. With respect to the stolen Tahoe, Cherry stated that the vehicle was probably "hot," that he was in the process of purchasing the vehicle's rims, and that he was driving the vehicle downtown so that he could remove the rims.

Cherry first challenges his conviction for felonious assault. Cherry was found guilty of one count of felonious assault involving serious physical harm and one count of felonious assault involving the use of a deadly weapon. He argues that the state failed to prove "that he was the perpetrator of this act."

But the state's evidence was more than sufficient to support a finding that Cherry had knowingly caused serious physical harm to Taylor with a gun. While there was no physical evidence linking Cherry to the crime, Taylor, his mother, and his brother identified Cherry from a photographic line up three days after the shooting and provided the trial court with consistent, eyewitness accounts of the shooting. Furthermore, at trial Cherry stipulated to having a prior conviction for drug trafficking. This stipulation and the evidence presented at trial sufficiently supported Cherry's convictions for felonious assault and having a weapon under a disability.

With respect to his conviction for receiving stolen property, Cherry contends that the state failed to prove that he knew or had reasonable cause to believe that the Tahoe had been stolen. But when he was stopped by the police, Cherry was unable to tell the officers where he had obtained the vehicle or who owned it. Furthermore, during his

interview with Officer Dotson, Cherry indicated that he knew something was wrong with the vehicle, stating that it was probably “hot.” This evidence, when combined with Cherry stipulations that the Tahoe had been reported stolen at the time that he was pulled over by police and that the owner, Miranda Muse, had not given him or anyone else permission to use the vehicle, was sufficient to sustain his conviction for receiving stolen property.⁴

Moreover, the trial court, as the trier of fact, was in the best position to judge the credibility of the witnesses. While Cherry and a friend testified that Cherry had not been present at the time of Taylor’s shooting, and Cherry further testified that he did not know or have reason to believe that the Tahoe he had been driving was stolen, the trial court was free to reject this testimony. Moreover, based upon our review of the record, we cannot conclude that any inconsistencies in the testimony of Taylor, his brother, and their mother rendered their testimony so unreliable or unworthy of belief that the trial court lost its way and created a manifest miscarriage of justice. We, therefore, overrule Cherry’s sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., PAINTER and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 18, 2009
per order of the Court _____.
Presiding Judge

⁴ See *State v. Arthur* (1975), 42 Ohio St.2d 67, 325 N.E.2d 888; *State v. Davis* (1988), 49 Ohio App.3d 109, 112, 550 N.E.2d 966.